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No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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This memorandum deals with the potential impact of the Court's recent decisions in *Marchetti* v. *United States,* No. 2, and *Grosso* v. *United States,* No. 12, decided January 29, 1968, on the instant case. Involved here was a forfeiture of money under 26 U.S.C. 7302 on the ground that it was property intended for use in violation of the internal revenue laws. In the government's brief in opposition filed in November 1967, we stated that a determination of the constitutional validity of the underlying statutes might have a bearing on the validity of the forfeiture. It is our present position that, under the decisions ren-

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dered January 29, 1968, which did not hold the wagering tax statutes unconstitutional, but barred criminal prosecution of those individuals who properly asserted the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of those statutes, the instant judgment of forfeiture of property should be allowed to stand.

1. The *Marchetti* and *Grosso* opinions are explicit in stating that the federal taxes on wagering as such are not invalid. Hence, when any person engages in the business of wagering without paying the occupational tax imposed by 26 U.S.C. 4411, or fails to pay the 10-percent excise tax imposed by 26 U.S.C. 4401, he is violating the internal revenue laws, even though he cannot, under the decisions, be criminally prosecuted for such violation as against a claim of self-incrimination. Thus, any property used in that wagering business is property used in violation of the internal revenue laws within the literal language of 26 U.S.C. 7302.

The enforcement of a forfeiture against property is not equivalent to a criminal prosecution against the individual, even though forfeiture proceedings are recognized as quasi-criminal. See *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693. The action is one *in rem* against the offending property which may, or may not, belong to the person who failed to pay the tax. Thus, in this very case, where the money forfeited was found on petitioner's person, it is immaterial whether the money was his or whether it belonged to some other person. Similarly, where an automobile is

forfeited because used in violation of the internal revenue laws, the guilt or innocence of the owner of the property is immaterial. *J. W. Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U.S. 505; *United States* v. *Bride,* 308 F. 2d 470 (C.A. 9); *Interbartolo* v. *United States,* 303 F. 2d 34, 37 (C.A. 1). The action is directed against the property, not the individual.

An item of property, as such, obviously has no privilege against self-incrimination. The proof that the property was intended for use in wagering must depend on evidence apart from any required declaration in connection with payment of taxes. It is true that there must also be proof that no tax has been paid on the wagering business, but we do not believe that such proof can be said to violate the privilege against self-incrimination of the owner of the property to such an extent that forfeiture should be barred. Even in a civil action to collect taxes, it would be necessary to show that the taxes had not been paid. The *Marchetti* and *Grosso* decisions create no impediment to such civil actions. And, as noted above, in an action against the property it is immaterial whether the person whose property is seized is the one who is liable for the taxes. Hence, proof of non-payment of taxes in order to seize the property would not necessarily involve proof that a property owner had declined to incriminate himself. For this reason, we think forfeitures under the wagering tax statutes do not violate the principles of *One 1958 Plymouth Sedan* v. *Pennsylvania, supra,* or *Boyd* v. *United States,* 116 U.S. 616. In each of those cases, the

government's effort to sustain the forfeiture involved an affirmative violation of a constitutional privilege—in the *Plymouth* case by use, in the forfeiture proceedings, of evidence illegally seized, and in *Boyd* by requiring the production of allegedly incriminating private papers under a statute which permitted judgment against the defendant upon his failure to do so. Proof that no taxes have been paid by anyone with respect to the business in which the property is being used has no such direct relationship to an assertion of the constitutional privilege. It is too remote to be deemed a penalty against an individual when the action itself is against property which may or may not belong to the individual.

2. At the least, it seems to us that the distinction between an action against property and an action against the individual is sufficient to warrant a ruling that, if the *Marchetti-Grosso* decisions apply to forfeitures, they should apply only to forfeitures occurring after January 29, 1968, the date of those decisions. As the recent decisions of this Court on the retroactivity of new constitutional rules establish, that question must be determined by considering the purpose of the new standard, the reliance by law enforcement authorities on the old standard, and the effect on the administration of justice of a retroactive application of the old standard. *Stovall* v. *Denno,* 388 U.S. 293, 297; *Johnson* v. *New Jersey,* 384 U.S. 719; *Tehan* v. *Shott,* 382 U.S. 406; *Linkletter* v. *Walker,* 381 U.S. 618.

We have not pressed for a non-retroactive application of the *Marchetti-Grosso* decisions to criminal pro-

ceedings which have not yet become final because it seems to us that, where the effect of a new standard is to create a complete defense to a criminal prosecution, such a defense, if asserted, would be recognized by a court in which the case is still pending. That situation appears to us as qualitatively different from a purely prophylactic rule dealing with the exclusion of evidence. In the case of forfeiture proceedings, however, where no individual is charged with crime and no record of criminal conviction results, it seems to us that all the reasons of policy set forth in the above-cited opinions of this Court argue against giving retroactive effect to the *Marchetti-Grosso* holdings, at least in this limited respect.

There is no question that in seizing property for forfeiture on proof that it was being used in violation of the internal revenue laws, IRS agents have relied upon the prior decisions of this Court upholding the validity of the wagering tax statutes. *United States* v. *Kahriger,* 345 U.S. 22; *Lewis* v. *United States,* 348 U.S. 419. But the proof of wagering which they assembled in order to make out a case for forfeiture involves no violation of any constitutional privilege and is in no way affected by the change of law represented by the *Marchetti-Grosso* decisions. And, as explained above, while proof that no taxes had been paid on the business for which the property was being used was required, this element did not necessarily require proof that the owner of the property was himself the person required to pay taxes. To give retroactive effect to the *Marchetti-Grosso* opinions in